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HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 711

LEONARD T. POCKMAN,

Appellant,

vs.

J. PAUL LEONARD, AS PRESIDENT OF THE SAN FRANCISCO STATE COLLEGE, H. E. BRAKEBILL, AS COMPTROLLER OF THE SAN FRANCISCO STATE COLLEGE, JOHN F. FISHER, AS EXECUTIVE OFFICER OF THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA, ROBERT C. KIRKWOOD, AS CONTROLLER OF THE STATE OF CALIFORNIA, *Appellees*

ON APPEAL FROM SUPREME COURT OF THE STATE OF CALIFORNIA

JURISDICTION

STATEMENT AS TO [redacted]

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STATEMENT OF APPELLANT RESPECTING JURISDICTION OF THIS COURT UPON APPEAL TO REVIEW JUDGMENT IN QUESTION.

Statement of the Case

The petitioner is an adult citizen of the United States and of California. He is a certificated teacher employed since 1946 on the teaching staff of the San Francisco State College, a public college established by the California legislature under Article IX of the California Constitution. On May 25, 1949, he was promoted and appointed Associate

Professor at said college by the president thereof, pursuant to proper authority, at a monthly salary of $458, effective as at Sept. 1, 1949. By that reappointment to said position for the fourth year of service he automatically obtained teacher's tenure under state law and thereupon was deemed to be reappointed, under Sec. 20391, California Education Code, to his position from year to year. State law provides that thereafter he can be dismissed from such position only for cause. Secs. 20392-3, Cal. Education Code.

Following his original appointment to his position in 1946 the appellant, under the provisions of Article I of the California Constitution and as required by the said college, subscribed and swore to the oath prescribed by Section 3 of Article XX of the California Constitution, the words of which are as follows:

> "I do solemnly swear that I will support the Constitution of the United States, and the Constitution of the State of California, and that I will faithfully discharge the duties of the office of (Instructor) according to the best of my ability."

On September 26, 1950, the California Legislature enacted the "Levering Act", Statutes of California 1951, 3rd Ex. Sess. 1950, ch. 7, p. 15, effective as of Oct. 3, 1950, under which petitioner, as a teacher in a public college, was conscripted as a civil defense worker to perform undefined civil defense duties, under Secs. 3100-3101 thereof, and was required to subscribe the special oath provided by Sections 3102 and 3103 thereof for civil defense workers. He refused to subscribe this special oath by the Nov. 3, 1950, thirty day deadline for the reasons specified in his petition for the writ. The appellees, under Section 3107 thereof, thereupon refused to certify him to the public payrolls and to pay him his compensation as a teacher for

the months of October and November, 1950, and ever since have continued to refuse such certification and to pay him his compensation as a teacher.

On Nov. 8, 1950, the State Director of Education gave appellant a notice of dismissal from his employment, under Sec. 20393 of the Cal. Education Code, charging he had been "guilty of gross unprofessional conduct" in failing and refusing "to take and subscribe" the Levering Act special oath. On Dec. 2, 1950, he filed with the State Personnel Board, as authorized by Sec. 20394 of said Code, a demand for a review of his dismissal. That review on the question of that dismissal has been held in abeyance by agreement between him and that Board pending a conclusive judicial determination of this cause, as have a number of like dismissal proceedings.

On February 2, 1951, appellant applied to the Supreme Court of California for a writ of mandate directed to the appellees and commanding them to certify him to the public payrolls and to pay him his compensation as a teacher from Sept. 1, 1950.

The cause was tested and decided by the Supreme Court of California upon the pleadings, consisting of the petition for the writ, demurrer and return thereto, which pleadings were supported by typewritten points and authorities in support thereof, pursuant to rule of that Court, oral argument on the issues and by briefs thereafter filed with said Court in response to questions propounded to the parties by that Court.

Thereafter, by Opinion on Oct. 17, 1952, the Supreme Court of California, by majority opinion of six Justices, Carter, J., dissenting, upheld the validity of the Levering Act in its entirety, declaring, however, that it would be unreasonable to hold that the State legislature intended to

forfeit appellant's salary earned during the statutory 30 day grace period and, in consequence, ordered the writ of mandate to issue for the limited purpose of directing appellees to pay his earned salary up to November 3, 1950, but denied his petition for the writ of mandate for compensation or other relief for any period subsequent thereto. From that judgment the appellant prosecutes his appeal.

Statutory Provisions Sustaining Jurisdiction

The Supreme Court of the United States has jurisdiction to review the final judgment of the Supreme Court of the State of California in question by appeal under and by virtue of the provisions of Title 28 U.S.C.A., Sec. 1257 (2), by reason of the fact that said final judgment was rendered by the Supreme Court of the State of California which is the highest court of the State of California in which a decision in the cause could be had and because there was and is drawn into question the validity of a State statute, to wit, the California "Levering Act" (Statutes of California 1951, 3rd Ex. Sess. 1950, ch. 7, p. 15; part of which now is incorporated in Sections 3100-3109, inc. in the California Government Code), on the ground of its being repugnant to the Constitution and laws of the United States and the decision of the Supreme Court of California is in favor of its validity.

Statute of the State Involved

The statute of the State, the validity of which is involved, is the California's "Levering Act" (Statutes and Amendments to the Code, California 1951, 3rd Ex. Sess. 1950, ch. 7, p. 15, appearing as added Sections 1 and 2, Chapter 8, to Division 4, Title 1 of the Government Code of California. This statute, set forth verbatim, is appended hereto as Appendix A.

Date of Judgment and of Application for Appeal

The Opinion of the Supreme Court of the State of California was filed October 17, 1952; its Order, Judgment and Opinion denying the petition for writ of mandate but ordering the writ to issue for the limited purpose of directing payment of petitioner's salary up to and including thirty days after October 3, 1950, was entered on October 17, 1952. Petitioner's petition for a rehearing was timely filed on October 31, 1952, and was denied by the order of that Court on November 14, 1953.

The application for appeal, assignment of errors and prayer for reversal were presented by appellant to the Chief Justice of the Supreme Court of the State of California and filed and the order allowing this appeal was made and entered in the office of the Clerk of the Supreme Court of California on February 11, 1953, and on said date a citation issued herein directed to the appellees to show cause why said judgment should not be corrected.

The appellant will urge in this Court each point made in his said assignment of errors.

Cases Believed to Sustain the Jurisdiction

The cases believed to sustain the jurisdiction of this Court are:

Wieman v. *Updegraff*, 97 L. Ed. 162; 73 S. Ct. 215.

Adler v. *Board of Education*, 342 U. S. 485.

Gerende v. *Board of Supervisors*, 341 U. S. 56.

Garner v. *Board of Public Works*, 341 U. S. 716.

Specification of State in Proceedings at Which and Manner in Which the Federal Questions Sought to Be Reviewed Were Raised.

The petition for a writ of mandate was an original proceeding instituted in the Supreme Court of the State of

California. Section 4 of Article VI of the California Constitution lodges original jurisdiction in that Court to issue writs of mandamus. *Hollman* v. *Warren*, 32 Cal. 2d. 351; *Hyatt* v. *Allen*, 54 Cal. 353, 359; *People* v. *District Court of Appeals*, 193 Cal. 19, 20.

The federal questions were raised by specific allegations in the petition for the writ. See paragraphs IX and XI of the petition for the writ. They were also raised by points and authorities as required by Rule 56(b) of the Rules On Original Proceedings In Reviewing Courts adopted by the Judicial Council of the State of California, effective July 1, 1943, as amended effective January 1, 1951, which appear in the Rules On Appeal For The Supreme Court And District Courts Of Appeal Of The State Of California, as amended effective January 1, 1951. They were argued orally before said Court. They also were raised in petitioner's brief which thereafter was filed in that Court in answer to questions propounded by that Court and also in his petition for rehearing. The Supreme Court of California expressly considered and decided these questions in its Opinion appearing as Appendix B hereto.

The Majority Opinion of the Supreme Court of California with the Dissenting Opinion of Carter, J., officially is reported in Volume 39 Advance California Reports, page 693, and a copy thereof is annexed hereto as Appendix B.

Statement of the Grounds upon Which It Is Contended That the Questions Involved Are Substantial

I

The State Statute Involved Is Void for Invading the Exclusive Federal Field and, in Consequence, for Depriving Appellant of His Liberty and Property Without Due Process of Law.

The "Levering Act", Statutes of California 1951, 3rd Ex. Sess. 1950, ch. 7, p. 15, on its face and also as construed and applied to appellant, is unconstitutional in its entirety for unlawfully conscripting him as a civil defense worker to perform unspecified civil defense activities as might be assigned to him by unknown superiors or by unknown law and in imposing upon him, under Section 3102 thereof, the requirement that he subscribe the special oath required by the Act of civil defense workers or forfeit his compensation and employment as a teacher by the State.

Simply by virtue of the fact that the appellant was a teacher employed by an agency of the State and, therefore, was a public employee the State, under Sections 3100 and 3101 of the Act, arbitrarily conscripted him as a "civil defense" worker "subject to such civilian defense duties as may be assigned" to him by his "superiors or by law". By that conscription he and all other public employees were required, by Section 3102 thereof, to take, within thirty days from October 3, 1950, the special oath commanded of "all civil defense workers" by Section 3103 thereof.

The appellant contends that his conscription as a civil defense worker and the requirement of that special oath were void as constituting an unlawful usurpation of power by the State, as being in excess of its jurisdiction, for constituting an interference with the federal police and war

powers lodged exclusively in Congress by Clauses 1, 11 to 16, inc., and 18 of Section 8 of Article I of the Constitution and in the President by Clause 1 of Section 2 of Article II of the Constitution and also for being prohibited to the State by Clause 10 of Article I of the Constitution.

The Supreme Court of the State of California in its Opinion disposed of this serious federal question by declaring that there was nothing in the act which purports to conscript public workers into military service or which declares them to be subject to martial law.

The Act arbitrarily conscripts appellant as a public school teacher to perform undefined civil defense duties which may be assigned to him by unspecified superiors or by unknown law. So far, however, it has required nothing of him except that he subscribe the special loyalty oath it requires of him as a conscripted civil defense worker. But it does, by its conscription, give the state legislature and administrative officers dictatorial power over the conscripts. The Act, in consequence, is an attempt to set up a type of martial or quasi-martial rule over civilians employed by the State. If the State now requires nothing but the special oath of the conscripts there is nothing to prevent the State, under the blanket powers conferred by the Act, from exercising complete dictatorial power over public employees within the sphere of whatever "civil defense activities" ultimately may come to mean. In reality the conscription Act itself is in the nature of a loaded weapon kept by the State on hand to regiment its public employees.

The State of California is not at war. It has not been invaded. It has not been threatened with invasion from without or with insurrection from within. In the absence of the consent of Congress it is prohibited by Clause 3, Section 10 of Article I of the Constitution from keeping troops and also from engaging in war "unless actually in-

vaded, or in such imminent danger as will not admit of delay." There is no existing public necessity or emergency confronting California or the Union either requiring or justifying the exercise of such undefined but sweeping powers the Act brings to sway over State employees. There is no existing national emergency which requires the exercise of like broad powers by the national government and no attempt has been made by Congress or the President to exercise like powers over the nation.

The duty of providing for the common defense, whether it consists of conscription for regular military duties or for civilian defense duties, would seem to be within the exclusive province of Congress, under Clauses I, 11 to 16, inc. and 18 of Section 8 of Article I of the Constitution, and the exclusive province of the President, under Clause 1 of Section 2 of Article II of the Constitution. These exclusive powers have not been delegated to the State of California or any State.

By its Levering Act the California Legislature attempts to set up the machinery for an arbitrary rule over its public employees. The conscription statute is not in furtherance of a national purpose of the federal government. We suggest, too, that the national safety is not the primary concern of the State of California but of the United States. We conclude that by this general conscription of State employees for the performance of unspecified civil defense duties outside their regular occupations the State has attempted to occupy a field exclusively reserved to the federal government and that, under the guise of state police power, it has invaded the exclusive field of federal police and war powers lodged in Congress and the President as Commander in Chief. State cannot occupy an exclusive sphere of the United States. See *Hines* v. *Davidowitz*, 313 U. S. 52, 63.

Freedom from general conscription for military or quasi-military purposes, except for national defense or war purposes when authorized by Congress, would seem to be an inherent and inalienable right of citizens. This right is not one to be impaired or destroyed by the State of California upon a fictitious legislative declaration by the State that its infringement is pursuant to "an urgency measure necessary for the immediate preservation of the public peace" when the urgency is based upon nothing more than "the present emergency in world affairs" mentioned in Section 4 of that Act. State action destructive of basic civil rights is not conclusively supported by mere "fiat". The State of California has no authority to set up an arbitrary rule over its public employees or over its inhabitants and deprive them of basic rights. Such action by a State violates the due process guaranty of the 14th Amendment. See *Sterling* v. *Constantin*, 287 U. S. 378. Even the federal government hasn't any such despotic power to suspend or destroy the basic constitutional rights of civilians in wartime on the fiction that martial rule justifies the exercise of such a power. See *Duncan* v. *Kahanamoku*, 327 U. S. 304.

II

The Act and Its Special Oath Requirement Are Void for Impairing the Obligation of Appellant's Contract of Employment.

A public school teacher's right to practice his profession as a teacher is a license or privilege granted by the State to qualified persons. Sec. 13031, Cal. Education Code. However, the employment of such a teacher to teach in any of the public schools arises by virtue of contract and creates vested rights in the teacher. A teacher in a State college receives annual appointments for the first three years of service, under Sec. 20372 of the Education Code and, upon

reappointment for the fourth year, automatically obtains teacher's tenure. Thereafter he is deemed reappointed from from year to year without the contract being evidenced by a written document, pursuant to Section 20391 of the Education Code, and thereafter can be dismissed from his employment only for cause, as provided for by Sections 20392-3 of that Code.

In 1946 the appellant was appointed to the teaching staff of the San Francisco State College by the president of that institution. Subsequently he received two like annual appointments. After serving for three consecutive years he was promoted and appointed Associate Professor at that College by the president thereof, pursuant to proper authority, at a monthly salary of $458, effective as at Sept. 1, 1949. By reappointment to that position for the fourth year of his employment he automatically obtained teacher's tenure and thereafter is deemed reappointed to his position from year to year pursuant to the provisions of Section 20391 of the Education Code. This contract of employment is not evidenced by a writing. It is a legislatively created annual contract arising under Section 20391 of that Code.

The appellant entered into the performance of his duties at that college on September 1, 1950, under such a legislatively created annual contract for the year ending August 31, 1951. He continued to teach there until Nov. 8, 1950, when he was dismissed from that employment by the Director of Education, the dismissal being retroactively made as at Nov. 3, 1950, because he had failed to subscribe the special oath prescribed by Sec. 3103 of the Levering Act by the deadline date of Nov. 3, 1950, as required by Sec. 3102 of that Act. The appellees refused to certify him to the public payrolls and to pay him his salary for the months of October and November, 1950, and ever since simply because of his refusal to subscribe said special oath.

On Nov. 8, 1950, the Director of Education gave appellant a notice of dismissal from his employment, under Sec. 20393 of the Education Code, charging he had been "guilty of gross unprofessional conduct" in failing "to take and subscribe" the Levering Act oath. On Dec. 2, 1950, appellant filed with the State Personnel Board, as authorized by Sec. 20394 of that Code, a demand for a review of his dismissal. That administrative review has been held in abeyance by stipulation pending a conclusive judicial determination of this cause.

The employment of teachers in the public schools and colleges of California is not a mere license, or privilege or gratuity to be cancelled at the whim of the State. It has been repeatedly held by the California Supreme Court that our public school teachers' employment arises out of contract. *Malloy* v. *Board of Education*, 102 Cal. 642, 646; *Williams* v. *Baguelle*, Cal. 699, 704; *Abraham* v. *Sims*, 2 Cal. 2d 698, 709; *Richardson* v. *Board of Education*, 6 Cal. 2d 583, 596; *Fry* v. *Board of Education*, 17 Cal. 2d 753; *Holbrook* v. *Board of Education*, 37 A. C. 316, 331-2. The District Courts of Appeal have followed the same line of decision. See *Martin* v. *Fisher*, 108 Cal. App. 34, 39; and *Owens* v. *Board of Education*, 68 Cal. App. 403, 406.

By refusing to certify the appellant to the public payrolls and to pay him compensation for the months of October and November, 1950, and since, and also by dismissing him from his employment the appellees impaired the obligations of his contract. The imposition of the Levering Act special oath requirement upon him by the appellees was nothing but the attaching of that oath as a condition subsequent to his contract of employment with the State to which he never acquiesced. In consequence, appellant submits that it was a void condition subsequently forbidden by Section 10 of Article I of the Constitution for impairing the obligations of his employment contract with the State.

The California Supreme Court, in its Opinion, on the assumption that appellant had a contract right to his position nevertheless declared that an implied condition of the contract is that he will be loyal to the government and not advocate its overthrow and that, under its police powers the state, as a means of implementing that implied condition, may require its employees to make a declaration of loyalty and furnish relevant information. It, nevertheless, found the contract had been impaired by the appellees through the withholding of appellant's compensation from September 1, 1950, to November 3, 1950, on which latter date the grace period for appellant to subscribe such oath expired. It concluded that the legislature had not intended to require a forfeiture of the salary earned during that period. Inasmuch as that Court denied the appellant compensation for any period after November 3, 1950, in effect it upheld the appellees in terminating not only compensation to the petitioner under his then existing contract of employment with the State but abrogation of the contract as well. This authorized the premature cancellation of appellant's existing annual contract of employment which was to have continued in full force and effect until August 31, 1951. This is tantamount to attaching to that existing contract an arbitrary condition subsequent, the subscription to the oath, without the appellant's consent. The oath requirement was applied to him *retroactively* as though that oath had been a condition precedent to his existing contract. Further, it amounted to a withholding of his compensation and of cancellation of his employment as a teacher not for what he did or did not do as a teacher but what he refused to do as a conscripted civil defense worker. This is a unique form of impairment of a contract.

It has been held that a State statute authorizing boards of education to regulate the amount of public school teacher's salaries *prospectively* does not violate the con-

tract clause of the Constitution. *Phelps* v. *Board of Education*, 300 U. S. 319. Likewise where neither the language of a state statute nor the circumstances of its adoption evinced an intention on the part of the State legislature to create a binding contract for pensions with teachers of the State this Court held that a reduction of such pensions by the State did not impair the contract clause because the pensions were gratuities and not vested rights. *Dodge* v. *Board of Education*, 302 U. S. 74. However, when a State enters into a written contract of employment with a person who is created an officer of the State to perform such services and the legislature thereafter abolishes the office the failure of the State to pay him the compensation accruing after the office was abolished impairs the obligations of that contract. *Hall* v. *Wisconsin*, 103 U. S. 5. We believe that the rule applicable in the instant case is that cited therein from the earlier decision of this Court in *Dartmouth College* v. *Woodward*, 4 Wheat. 694, in the following language:

> "It is admitted that the State Legislatures have power to enlarge, repeal and limit the authorities of public officers in their official capacities, in all cases where the Constitutions of the States respectively do not prohibit them; and this, among others, for the very reason that there is *no express or implied contract* that they shall always, during their continuance in office, exercise such authorities. But when the Legislature *makes a contract* with a public officer, as in case of a *stipulated salary* for his services *during a limited period*, this, during the limited period, is just as much a contract, within the purview of the constitutional prohibition, as a like contract would be between two private citizens."

Applying that rule to his case it would seem clear that the California Legislature could not require the special oath of the Levering Act to be attached as a new condition

to be performed by the appellant under his annual contract of employment which then was in existence and had some eleven months yet to run. Whether such a condition might be attached as a condition precedent to his right to a renewal of his contract for the succeeding year may present a somewhat different question.

III

The Act Is Void for Depriving Appellant of His Liberty by the Conscription and Also of His Property, as Construed and Applied to Him, Without Due Process of Law.

(a) The Act is so vague, indefinite, uncertain and ambiguous in material respects that it cannot be ascertained therefrom what the purpose, scope and functions are of the civil defense corps it creates. It fails to inform us who the "superiors" of the civil defense workers are. It fails to prescribe the duties to be performed by the civil defense workers, the terms and conditions of such service, and whether or not they are to receive compensation for the performance of such duties. It fails to prescribe whether the work to be performed by civil defense workers is in lieu of their regular employment or in addition thereto. It fails to inform them what they are to do and when and where they are to perform such activities. It does not prescribe any comprehensive or intelligible guide, rule or information as to these important matters but leaves these important matters to conjecture and surmise. In conscripting public workers for such vague purposes it deprives them of their liberty without due process of law in violation of the provision of the 14th Amendment. See, *Musser* v. *Utah*, 333 U. S. 95, 97; *Winters* v. *New York*, 333 U. S. 507, 518; *Connally* v. *General Const. Co.*, 269 U. S. 385, 394; *U. S.* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 92.

(b) In addition, inasmuch as the Act in spite of its incurable vagueness has been construed and applied herein to the appellant by the appellees so as to deprive him of the compensation flowing from his contract of employment and to abrogate that contract the Act thereby deprived him of his property without due process of law in violation of the due process guaranty of the 14th Amendment.

In its Opinion the California Supreme Court disposed of the foregoing serious questions by asserting that nearly all of our contentions of violations of constitutional guaranties has been answered adversely by recent decisions of this Court. However, none of the decisions it cites for that conclusion involved the conscription by a State of its public employees to perform civil defense duties either within the scope of their regular employment or aside therefrom and to require them, as such conscripts, to subscribe a special oath which has relevancy to their duties as conscripts.

The California Supreme Court concluded that a teacher might be assigned certain duties relating to civil defense "such as instructing pupils regarding their behaviors during atomic explosions, air raids or other attacks," and that tasks of such a nature fall within the scope of the duties of a teacher and may be required of him regardless of the fact that they may also constitute civil defense activities. However, we have no quarrel with any course of instruction the State may prescribe to be given by teachers in their regular course of employment. No such issue is involved herein. The civil defense duties to which the Act relates clearly are duties outside the scope of the conscripted persons regular employment. Our quarrel is with a coercive general conscription of State public employees to perform undefined duties outside their regular employment which requires them to take a special oath as such conscripts and punishes them for a refusal to take that oath by depriving them of

compensation arising from their regular employment and by compelling a forfeiture of that employment.

In its Opinion the California Supreme Court declared there was "no complaint that any specific civil defense duties have been imposed on the appellant under the Act and that it would not assume that any improper assignments will be made. However, the first assignment of a duty imposed by that Act is that the conscripted public employees subscribe its special oath and thereafter hold themselves in readiness to perform whatever other undefined duty might lie within the scope of "civil defense activities as may be assigned to them by their superiors or by law." It would appear that a person to be conscripted should be entitled to some information as to what the real nature and purpose of his conscription is to be and the duties he is to perform. He should not be kept blind or in the dark as to these matters. The due process clause of the 14th Amendment would appear to guarantee this minimum protection to every public employee in the State. The Act, however, leaves these important matters to conjecture and surmise.

The California Supreme Court, sub silentio, decided that Act was not vague, indefinite or uncertain in its provisions. It expressly decided, however, that the Act did not invalidly delegate legislative power to define and impose civil defense duties because it drew the conclusion that the "superiors" in assigning duties were limited to such authority as they already have or may subsequently be granted by law, leaving the meaning of the word "superiors" undetermined and the nature and scope of these nebulous civil defense duties unexplained.

(c) In its conscription act, the Selective Training and Service Act of 1940, the federal government sets up administrative hearing boards and provides the machinery of ad-

ministrative appeal for those who are aggrieved. Their decisions are subject to judicial review just to make certain that the due process guaranty of the 5th Amendment shall not become meaningless. The Levering Act, however, makes no provision for administrative hearings on the question of the necessity of the conscription of state employees and on the necessity for subscription to the oath it prescribes. As construed and applied to the appellant it arbitrarily deprived him of compensation and employment simply for his refusal to subscribe that oath without, however, providing for him any hearing on the necessity for such drastic action. In consequence, it deprived him of even the rudiments of the due process of law guaranteed to him by the 14th Amendment. See, *Morgan* v. *U. S.*, 304 U. S. 1.

IV

The Act Is Void for Denying Appellant Equal Protection of the Law

The "Levering Act" conscripts public employees of the State and its subdivisions as civil defense workers and requires of them as such conscripts first that they subscribe its special oath and thereafter hold themselves in readiness to perform undefined civil defense activities outside the scope of their regular employment and, for a failure to subscribe that special oath, deprives them of their regular employment and of compensation for that employment. It excludes from its conscription and from subscription to that oath, however, those public servants exempted by Section 3 of Article XX of the California Constitution, aliens legally employed, all persons employed by private entities and all those who are self-employed. In consequence, it discriminates against the appellant and all other affected public employees for no reason except that they are employed by the State. We submit that this constitutes a denial of

the equal protection of the laws forbidden by the equality clause of the 14th Amendment. *Yick Wo* v. *Hopkins*, 118 U. S. 356.

We direct attention to the fact that the national government has not provided for the blanket conscription of federal employees as civil defense workers or for any other purpose. It never has attempted to set up a conscription program of the type the Levering Act sets up. The national conscription act, Selective Training and Service Act of 1940 (50 USCA, App. Sec. 301, *et seq.*), drafts persons, citizens and aliens alike, without distinction as to whether they are publicly or privately employed. It conscripts them on a basis of equality. It thereby makes certain that the equal protection of the laws which implicitly is guaranteed by the due process clause of the 5th Amendment is preserved. The California "Levering Act", however, seems to have been enacted with little regard for the equal protection guaranty of the 14th Amendment. The majority Opinion of the California Supreme Court in this case apparently concluded that this issue was one of those which had been disposed of adversely to our contention by recent decisions of this Court although we find no such pronouncement by this Court therein. We submit that this conscription statute is a case of first impression involving serious constitutional issue requiring final settlement by this Court.

V

The Act Is Void as a Bill of Attainder and for Being an Ex Post Facto Law

(Bill of Attainder)

(a) The "Levering Act" inflicts punishment, *i. e.*, loss of certification to the public payrolls and consequent loss of compensation and of employment, without a judicial trial

simply for the failure of an arbitrarily conscripted person to take the oath it prescribes. In consequence, is a "bill of pains and penalties" which is proscribed by Section 10 of Article I of the Constitution. Permanent proscription from a government post or position or from the right to follow a lawful profession without hearing constitutes punishment and, consequently, is forbidden for being a bill of attainder. *U. S.* v. *Lovett*, 328 U. S. 303, 316-7; *Cummings* v. *Missouri*, 4 Wall. (U. S.) 277, 18 L. Ed. 356; *Ex parte Garland*, 4 Wall. (U. S.) 333, 18 L. Ed. 366; and *Anderson* v. *Baker*, 23 Md. 531, 604, defining such bills.

(Ex Post Facto Law)

(b) The appellant entered into the performance of the duties of his employment under his contract commencing on Sept. 1, 1950. The Levering Act became effective as at Oct. 3, 1950, as an urgency measure. It required appellant to subscribe its oath on or by Nov. 2, 1950. He refused to take that oath. The appellees refused to pay him compensation for the months of October and November, 1950, and since then. The decision of the California Supreme Court held him entitled to compensation arising from his regular employment as a teacher up to Nov. 2, 1950, but to none thereafter because of his refusal to subscribe said oath. In consequence, the oath requirement of that Act, was construed and applied to appellant *retroactively* as though it had been a condition precedent to the renewal of his then existing annual contract of employment which had been entered into on Sept. 1, 1950. In consequence, we submit that the requirement of the Levering Act special oath, as construed and applied to appellant, is void for being an *ex post facto* law forbidden by Section 10 of Article I of the Constitution.

The majority Opinion of the California Supreme Court disposed of the contentions that the Act, as construed and

applied to appellant, was void as a bill of attainder and for being an *ex post facto* law by its conclusion that nearly all of our contentions as to violations of constitutional guarantees had been answered adversely thereto by recent decisions of this Court. However, we suggest that in none of the decisions to which it refers was this Court called upon to pass upon the validity of a State conscription statute and its incidents which give rise to the novel questions presented in this case.

Conclusion

For the foregoing reasons we respectfully submit that the federal questions involved herein are substantial and are of exceptional public importance; that the appellant comes within the proper jurisdiction of this Court and that this Court has jurisdiction of his appeal.

Dated: February 10, 1953.

Wayne M. Collins,
Attorney for Appellant.

APPENDIX A

Government Code, Division 4, Title 1:

Section 1, Chapter 8 is added to Division 4, Title 1 of the Government Code to read:

CHAPTER 8. OATH OR AFFIRMATION OF ALLEGIANCE FOR CIVIL DEFENSE WORKERS AND PUBLIC EMPLOYEES

3100. It is hereby declared that the defense of the civil population during the present state of world affairs is of paramount state importance requiring the undivided attention and best efforts of our citizens. In furtherance of such defense and in the exercise of police power of the State in protection of its citizens, all public employees are hereby declared to be civil defense workers subject to such civilian defense activities as may be assigned to them by their superiors or by law.

3101. For the purpose of this chapter the term "civil defense worker" includes all public employees and all volunteers in any civilian defense organization accredited by the State Disaster Council. The term "public employees" includes all persons employed by the State or any county, city, city and county, state agency or public district, *excluding aliens legally employed.*

3102. Subject to the provisions of Section 3 of Article XX of the Constitution, all civil defense workers shall within the first 30 days of employment take and subscribe to the oath or affirmation required by this chapter.

3103. The oath or affirmation required by this chapter is as follows:

"I, ————, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

"And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means; that within the five years immediately preceding the taking of this oath (or affirmation) I have not been a member of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means except as follows:

.....

(If no affiliations, write in the words 'No Exceptions')

and that during such time as I am a member or employee of the ———— I will not advocate nor become a member
(name of public agency)

of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means."

3104. The oath or affirmation may be taken before any officer authorized to administer oaths.

No fee shall be charged by any person before whom the oath or affirmation is taken and subscribed.

3105. The oath or affirmation of any civil defense worker of the State shall be filed with the State Personnel Board within 30 days of the date on which it is taken and subscribed.

The oath or affirmation of any civil defense worker of any county shall be filed in the office of the county clerk of the county.

The oath or affirmation of any civil defense worker of any city shall be filed in the office of the city clerk of the city.

The oath or affirmation of any civil defense worker of any other agency or district shall be filed with such officer or employee of the agency or district as may be designated by such agency or district.

3106. Compliance with this chapter shall, as to state employees, be deemed full compliance with Chapter 4,

Part 1, Division 5, Title 2 of this code, requiring taking of oaths by state employees.

3107. No compensation nor reimbursement for expenses incurred shall be paid to any civil defense worker by any public agency unless such civil defense worker has taken and subscribed to the oath or affirmation required by this chapter. It shall be the duty of the person certifying to public pay rolls to ascertain and certify that such civil defense worker has taken such oath or affirmation.

3108. Every person who, while taking and subscribing to the oath or affirmation required by this chapter, states as true any material matter which he knows to be false, is guilty of perjury, and is punishable by imprisonment in the state prison not less than one nor more than 14 years.

3109. Every person having taken and subscribed to the oath or affirmation required by this chapter, who, while in the employ of, or service with, the State or any county, city, city and county, state agency, public district, or civilian defense organization advocates or becomes a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States by force or violence or other unlawful means, is guilty of a felony, and is punishable by imprisonment in the state prison not less than one nor more than 14 years.

Sec. 2. Subject to the provisions of Section 3 of Article XX of the Constitution, all persons designated in Chapter 8, Division 4, Title 1, of the Government Code as civil defense workers, on the effective date of this act shall, within 30 days, take and subscribe to the oath or affirmation required by Chapter 8, Division 4, Title 1, of the Government Code. Any public employee who is on authorized leave on the thirtieth day after the effective date of this act shall take and subscribe said oath or affirmation within 30 days of his return to work.

Sec. 3. If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

Sec. 4. This act is an urgency measure necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

During the present emergency in world affairs loyalty and allegiance to the United States and the principles for which it stands are of utmost importance. Immediate assurance that persons in civil defense are loyal to this government and are not in fact advocates of its overthrow by force or violence is essential to the well-being of the State and Nation and the confidence of the people. It is therefore necessary that this act take effect immediately.

Stats. 1950, Chap. 7 (Third Extra Sess.)

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK

S. F. 18349

LEONARD T. POCKMAN, Petitioner,

v.

J. PAUL LEONARD, as President of San Francisco State College, et al., Respondents

This is an original proceeding in mandamus brought by an associate professor at San Francisco State College to compel respondents to certify his name on the public payroll and to pay him salary which was withheld because of his failure to execute the oath required by sections 3100-3109 of the Government Code, known commonly as the Levering Act. (Stats. 1951 [3rd Ex. Sess. 1950, ch. 7], p. 15.)

The statute declares that all public employees are "civil defense workers, subject to such civilian defense activities as may be assigned to them by their superiors or by law," and it defines public employees as all persons employed by

the state or any county, city, city and county, state agency or public district, excluding aliens legally employed. (Gov. Code, §§ 3100-3101.) "Subject to the provisions of Section 3 of Article XX of the Constitution," all civil defense workers are required to take the oath prescribed by section 3103 of the Government Code within the first 30 days of employment. (Gov. Code, § 3102.) It is further provided that no compensation shall be paid to any civil defense worker by any public agency unless he has subscribed to the oath, and that it shall be the duty of the person certifying to public payrolls to ascertain and certify that the oath has been taken by such workers. (Gov. Code, § 3107.) Section 3108 declares that it is perjury to make false statements in the oath, and section 3109 makes it a felony for a person, after taking the oath and while in public employment, to advocate or become a member of an organization which advocates overthrow of the government by force or other unlawful means. The remaining sections (Gov. Code, §§ 3104-3106) specify the manner of taking and filing the oath and provide that compliance with the act shall be deemed compliance with Government Code sections 18150-18158[1] relating to the taking of oaths by state employees.

The act went into effect October 3, 1950. Petitioner failed to take the required oath within 30 days thereafter, and respondents refused to certify his name to the public payroll or to pay his salary for services rendered during the months of October and November.

The first question is whether the provisions which declare public employees to be civil defense workers, "subject to such civilian defense activities as may be assigned to them by their superiors or by law," render the entire act invalid. (Gov. Code, §§ 3100-3101.) Petitioner asserts that the statute imposes on public employees a rule of martial law and "herds them into a headless, tailless and nondescript military body." There is nothing in the act, however,

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[1] Gov. Code, §§ 18150-18158, provide that every person appointed to a state position, whether civil service or non-civil service, shall within 30 days of appointment take a prescribed oath which is the same as that set forth in Const., art. XX, § 3.

which purports to conscript public workers into military service or which declares them to be subject to martial law. Petitioner also claims that the act improperly subjects him to assignment to activities outside and beyond his regular duties. It is clear, however, that a teacher may properly be assigned certain duties relating to civil defense, such as the instruction of pupils regarding their behavior during atomic explosions, air raids or other attacks. Tasks of this type, like the holding of fire drills, are within the scope of the duties of a teacher and may be properly required of him regardless of the fact that they may also constitute civil defense activities. There is no complaint that any specific civil defense duties have been imposed on petitioner under the act, and we should not assume that any improper assignments will be made. The provision that workers are subject to such activities "as may be assigned to them by their superiors or by law" does not, as asserted invalidly delegate legislative power to define and impose civil defense duties. Instead, the reasonable construction is that the superiors, in making assignments, are limited to such authority as they already have or may subsequently be granted by law.

We turn now to other arguments made by petitioner. The oath which he has refused to take reads as follows:

> "I, ———— do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.
>
> "And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means; that within the five years immediately

preceding the taking of this oath (or affirmation) I have not been a member of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means except as follows:

_____

(If no affiliations, write in the words 'No Exceptions')

and that during such time as I am a member or employee of the _____ I will not advo-

(name of public agency)

cate nor become a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means." (Gov. Code, § 3103.)

Section 3 of article XX of the state Constitution provides:

"Members of the Legislature, and all officers, executive and judicial, except such inferior officers as may be by law exempted, shall, before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation:

'I do solemnly swear (or affirm, as the case may be,) that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of the office of _____, according to the best of my ability.'

"And no other oath, declaration, or test shall be required as a qualification for any office or public trust."

When petitioner was appointed to the state college faculty in 1946 he took an oath identical to that prescribed in section 3 of article XX, and he argues that he is exempted by the last sentence of that section from taking any "other oath, declaration or test" and, hence, cannot be required to take the oath prescribed by section 3103 of the Government Code.

When resort is had to the historical background of the constitutional provision, it appears that the words "oath,

declaration or test" have an important connotation in connection with qualifications for public service. The English "test" act of 1673, which was so odious to the people, required all civil and military officers to take "oaths" of allegiance and supremacy and to make "declarations" regarding matters of opinion, particularly religious beliefs. (8Stat. 25 Car. II, c. 2; see 4 Blackstone Commentaries 59.) This act was undoubtedly in the minds of the framers of state Constitutions when they used these words in drafting constitutional provisions similar to ours. (People v. Hoffman [Ill. 1886] 5 N.E. 596, 605; Attorney General v. City of Detroit [Mich. 1885] 24 N.W. 887, 889-890; Rogers v. City of Buffalo [1888], 3 N.Y.C., 671, 673-674 [affirmed 25 N.E. 274, 278-279].)

The prohibition contained in section 3 [2] was considered in the early case of Cohen v. Wright, 22 Cal. 293, where it was said at page 310, "In our judgment it was not intended to limit the action of the Legislature to the particular set form of words used in the Constitution, and it is clearly within their power to prescribe any form, so that they do not go beyond the intent, object and meaning of the Constitution." And in Bradley v. Clark, 133 Cal. 196, 201, it was stated that the language in section 3 "leaves as the only matter for determination the single question, whether [the statute there involved] does impose an oath or test substantially different from that prescribed by the Constitution." In this connection, it would seem clear that any oath or declaration which imposes a religious or political test is prohibited. (See Bradley v. Clark, 133 Cal. 196, 201; Rogers v. City of Buffalo, supra, 3 N.Y.S. at pp. 673-674; Attorney General v. City of Detroit, supra, 24 N.W. at p. 890 [concurring opinion]; cf. United Public Workers v. Mitchell, 330 U. S. 75, 100, — S. Ct. —.) It has been recognized, however, that such a constitutional prohibition does not prevent the examination of public employees for skill, education, or other qualities reasonably related to qualifications for public service. As said in Rogers v. City of Buffalo [N.Y.] 25 N.E. 274, 278, in answer to a contention that "nothing but

[2] At the time of the Cohen case the provision appeared in § 3, art. XI, Const. of 1849.

the bare oath" mentioned in the Constitution could be required, "We do not think that the provision above cited was ever intended to have any such broad construction. Looking at it as a matter of common sense, we are quite sure that the framers of our organic law never intended to oppose a constitutional barrier to the right of the people through their legislature to enact laws which should have for their sole object the possession of fit and proper qualifications for the performance of the duties of a public office on the part of him who desired to be appointed to such office." (See also Attorney General v. City of Detroit [Mich.], 24 N.W. 887, 889-890.)

Before proceeding to determine whether the oath set forth in section 3103 of the Government Code is substantially the same as the constitutional oath, we shall consider respondents' contention that petitioner is not entitled to the benefit of the constitutional prohibit because, it is asserted, he is not the holder of an "office or public trust" within the meaning of that provision. The terms "office" and "public trust" have been said to be nearly synonymous (Ex parte Yale, 24 Cal. 241, 243), but the particular positions to which they apply have not been clearly defined. Different results have been reached in classifying public positions involving similar duties and responsibilities, and the meaning and extent of the term "office" tends to vary with the purpose of the statute in which it appears. (See, for example, Patton v. Board of Health, 127 Cal. 388, 393-397; People v. Wheeler, 136 Cal. 652, 654-655; Wall v. Board of Directors, 145 Cal. 468, 471-472, 473; Coulter v. Pool, 187 Cal. 181, 185-187; Spreckels v. Graham, 194 Cal. 516, 525-532; Brooks v. City of Gilroy, 219 Cal. 766, 770-772; People v. Rapsey, 16 Cal. 2d 636, 639-640; Sims, "What is a Public Office in California," 8 So. Cal. L. Rev., 11 [1934].) Accordingly, the cases which have dealt with the term in construing statutes unrelated to the subject involved here are not particularly helpful, and we must look to the purposes of section 3 in order to ascertain the intention of its framers.

There is no merit in respondents' suggestion that the only persons entitled to the benefit of the prohibition are members of the Legislature, judges and the seven executive

officers mentioned in article V of the Constitution.[3] The provision of section 3 requiring the oath to be taken by all officers, except "inferior officers" exempted by the Legislature, shows that the requirement is not limited to the persons named in article V and that it at least includes all inferior officers who are not exempted. It would do violence to the plain meaning of the words used if the section were read as providing that the Legislature might exempt "inferior officers" from taking the prescribed oath and at the same time compel them to take some other kind of "oath, declaration or test." We are unable to find any place where a line can reasonably be drawn so as to place some positions within and others outside the constitutional prohibition, and, in our opinion, there is no justification for excluding any public servants from its protection. The prohibition should therefore be read as applying to every state and local officers and employee. This construction is in accord with the basic purpose of safeguarding the public and its servants by forbidding oaths and declarations regarding matters that bear no reasonable relationship to governmental service and particularly those that involve political and religious beliefs. Persons in the lower levels of government are just as much entitled to this protection as those in higher positions. Any other interpretation of the prohibition would lead to the absurd result that the relatively few persons who occupy the most important positions could be required to take only the constitutional oath, while those who work under them and execute their orders could be compelled to submit to various other oaths, declarations and tests.

We come now to the question whether there is any substantial difference between the oaths prescribed by the state Constitution and by section 3103 of the Government Code. The constitutional oath consists of a declaration or pledge of loyalty to the state and federal Constitutions, and a promise or pledge of faithful performance of duty. The first paragraph of the oath required by section 3103 contains

[3] Those officers are: governor, lieutenant governor, secretary of state, controller, treasurer, attorney general and surveyor general. Pursuant to Const., art. V, § 19, the office of surveyor general was abolished by Pol. Code, § 690, in 1929.

substantially the same pledge of loyalty and faithful performance of duty as that found in the constitutional oath, with only immaterial differences in language. In the second paragraph the affiant swears to three matters namely, (1) that he does not advocate or belong to any organization that advocates overthrow of the government by force or violence or other unlawful means; (2) that within the five years immediately preceding the taking of the oath he has not been a member of any such organizations except those which he lists in the space provided on the face of the oath; and (3) that while employed by the designated agency he will not advocate or become a member of any organization that advocates such doctrines.

It should be noted at the outset that the oath provisions relating to membership can reasonably be construed as referring only to affiliation with organizations *known* by the employee to belong to the proscribed class, and each clause of the oath must be interpreted as requiring knowledge of the character of any group as to which a declaration is required. (See Garner v. Los Angeles Board, 341 U. S. 716, 723-724.)

The first and third parts of the second paragraph are essentially a declaration of present and future loyalty to the government of this state and of the United States. A person obviously cannot be loyal to a government and at the same time advocate its violent and unlawful overthrow. By the same token, voluntary unexplained membership in an organization known by a public employee to advocate such doctrines indicates that he has interests which are inconsistent with his pledge of loyalty and faithful performance of duty, and the Legislature, by requiring this oath, has in effect found that such membership is incompatible with loyalty.[4] In the recent case of Adler v. Board of Education of City of New York, — U. S. —, 72 S. Ct.

[4] Since 1947 Gov. Code, § 1028 has provided: "It shall be sufficient cause for the dismissal of any public employees including teachers in the public schools or any state supported educational institution when such public employee or teacher advocates or is a member of an organization which advocates overthrow of the Government of the United States or of the State, by force, violence, or other unlawful means."

380, 386, the United States Supreme Court sustained as reasonable an implied legislative finding that "the member by his membership supports the thing the organization stands for, namely the overthrow of the government by unlawful means."

The middle part of the second paragraph of the oath calls for disclosure of information relating to past loyalty. In it the affiant is required to list any organizations, to which he has belonged in the five years preceding taking of the oath, that advocated overthrow of the government by force or violence or other unlawful means. Information as to past affiliations may be relevant in determining whether an employee can be placed in a position of present or future public responsibility. (See Garner v. Los Angeles Board, 341 U. S. 716, 720; Adler v. Board of Education of City of New York, — U. S. —, —, 72 S. Ct. 380, 385.) Nothing in section 3 of article XX is intended to prevent the state from requiring disclosure of facts relating to an employee's fitness and suitability for public service, and inasmuch as this portion of the oath, in effect, calls for a statement of past loyalty which is relevant to present and future loyalty, it is in no way inconsistent with the spirit or intent of the constitutional oath.

The oath required by section 3103 is obviously not a test of religious opinion. Neither does it compel disavowal of any political belief or membership in any named political party. While it requires the affiant to swear that he does not advocate, or belong to any party or organization which advocates overthrow of the government by force or violence or other unlawful means, these may not properly be called matters of political opinion. The word "political" imports orderly conduct of government, not revolution, and the term is not applicable to advocacy of a belief in overthrow of the government by force or violence. (See Lockheed Aircraft Corp. v. Superior Court, 28 Cal. 2d 481, 485.)

We are satisfied that there is nothing in the Levering oath which goes beyond the object or meaning of section 3 of article XX and that it is not the type of "other oath, declaration or test" which was intended to be prohibited by that section.

Nearly all of the contentions made by petitioner concerning asserted violations of federal constitutional guarantees are answered adversely to him by recent decisions of the United States Supreme Court. It has been held that a governmental body has the right to direct that its employees shall not belong to organizations which they know advocate overthrow of the government by force or other unlawful means, and that they may be required to make sworn statements similar to the oath prescribed by section 3103 as a condition to obtaining or continuing in public employment. (Adler v. Board of Education of the City of New York, — U. S. —, 72 S. Ct. 380; Garner v. Los Angeles Board, 341 U. S. 716; Gerende v. Election Board, 341 U. S. 56; cf. Dennis v. United States, 341 U. S. 494; Communications Assn. v. Douds, 339 U. S. 382.) A person's associates, as well as his conduct, are relevant factors in determining fitness and loyalty, and the state, under its police power, may properly limit a person's freedom of choice between membership in such organizations and employment in the school system. (Adler v. Board of Education of the City of New York, — U. S. —, 72 S. Ct. 380, 385.)

Past conduct and loyalty have a reasonable relationship to present fitness and trustworthiness, and public servants may properly be required to furnish information regarding past membership in organizations that to their knowledge advocated the overthrow of government by force or other unlawful means. (See Garner v. Los Angeles Board, 341 U. S. 716, 719-720.) The fact that divulging past or present membership may, under some circumstances, amount to self-incrimination does not render the act invalid since the disclosure of the required information is a reasonable condition or qualification of employment. (See Christal v. Police Commission, 33 Cal. App. 2d 564; 64 Harv. L. Rev., 987-996; 28 Cal. L. Rev., 94-95; cf. United Public Workers v. Mitchell, 330 U. S. 75.)

Petitioner is a permanent employee of the college, with teacher's tenure, and he claims that the act has been applied so as to impair contractual obligations. Even if we assume that petitioner has a contract right to his position, there can be no question that an implied condition of the agree-

ment is that he will be loyal to the government and that he will not advocate its overthrow by force. Under its police power the state may, as a means of implementing the implied condition, require its employees to make a declaration of loyalty and furnish relevant information. "The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worth while,—a government which retains adequate authority to secure the peace and good order of society." (Home Bldg. & Loan Assn. v. Blaisdell, 290 U. S. 398, 435; cf. East New York Bank v. Hahn, 326 U. S. 230, 232; Lincoln Union v. Northwestern Co., 335 U. S. 525, 531-532; Veix v. Sixth Ward Assn., 310 U. S. 32, 38.) It appears, however, that respondents applied the act improperly in withholding payment for services rendered by petitioner prior to the date on which he was required by law to take the oath. (Stats. 1951 [3rd ex. sess. 1950, ch. 7 § 2] pp. 15, 17.) Employees were given a thirty-day period of grace after the effective date of the act within which to decide whether or not they would take the oath, and it would be unreasonable to hold that the Legislature intended to require a forfeiture of the salary earned during this period in the event that an employee chose to leave his position rather than comply with the condition.

It follows that petitioner is entitled to compensation for services rendered up to and including thirty days following October 3, 1950, the effective date of the statute, but, having failed to take the oath, he is not entitled to compensation for any subsequent period.

Insofar as petitioner seeks payment of salary or other relief for any period subsequent to thirty days after October 3, 1950, the application is denied. Let a writ of mandate issue for the limited purpose of directing payment of petitioner's salary up to and including thirty days after October 3, 1950.

GIBSON, C. J.

We Concur: Shenk, J.; Edmonds, J.; Traynor, J.; Schauer, J.; Spence, J.

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S. F. 18349

POCKMAN *v.* LEONARD

DISSENTING OPINION

I dissent.

The only word of commendation which I can speak for the opinions of the court in these cases is that they bring into sharp focus the loyalty oath hysteria which has pervaded this country and particularly this state during the past five or six years. The concept that a person exposed to subversive activity may be immunized against such exposure by the taking of a so-called loyalty oath opens the door for vast exploration in the field of metaphysical research. While this process is taking place the loyalty of every public employee is impugned even though he has taken the oath prescribed by the Constitution many times and has obeyed it religiously. It must be conceded, however, that those who have been loyal may become disloyal and that "eternal vigilance is the price of liberty," but it should not follow that vigilance against disloyalty of public employees requires that they take an oath proscribed by the Constitution. The holding of the majority in these cases requires the taking of such an oath.

From the records before us in the various cases decided by the opinions this day filed, it would appear that many days, weeks and possibly months were consumed by the state Legislature, the Board of Regents of the University of California and the various boards of supervisors and city councils of the counties and cities of California in the preparation, discussion and adoption of various loyalty oath proposals. In addition to the time consumed in the legislative field, these cases have been before the various courts of this state during the past two or three years where thousands of pages of transcripts and briefs have been prepared and filed and the time and effort of numerous judges and lawyers has been consumed in their disposition. In my opinion all of this time and effort, as well as the money

necessarily expended in connection with the legislation and judicial proceedings, which must have amounted to thousands, if not millions of dollars, was, and is entirely wasted, and has been and will be of no benefit whatsoever either to the general public or the individuals affected thereby. There can be no escape from this conclusion when we consider that the Constitution of this state expressly and specifically declares the form of oath required of all persons holding any public position under the law of this state, and expressly provides that: "No other oath, declaration or test shall be required as a qualification for any office or public trust." (Cal. Const., Art. XX, sec. 3.) The oath prescribed by the Constitution is a simple, concise declaration, solemnly made by the person taking it, that he will support the Constitution of the United States and the Constitution of the State of California and faithfully discharge the duties of the office or employment which he is undertaking to the best of his ability. The constitutional provision, by implication at least, confers upon the Legislature the power to require that this oath be taken by all who occupy any office or public trust under the law of this state and the Legislature saw fit to require that all state employees take such oath. (See Gov. Code, § 18150, et seq.) It is a conceded fact in each of these cases that every employee of the state here involved took the constitutional oath long before the enactment of the acts which constitute the basis of this litigation. Notwithstanding this undisputed fact, the majority of this court holds in each of these cases that these petitioners are required to take another oath prescribed by the so-called Levering Act (Stats., 1951 [3rd extra session 1950, ch. 7, p. 15]) which, it is said, is no different than the oath prescribed by the Constitution. The majority nevertheless holds that because each of the petitioners has failed to take the oath prescribed by the Levering Act, they have forfeited their position with the state in accordance with the provisions of that act. This is indeed strange and paradoxical reasoning. In effect the majority says: No employee of the state is required to take any other oath than that prescribed by the Constitution, but even though all employees of the state have taken the constitutional oath, they must

also take the Levering Act oath which is the same as that prescribed by the Constitution, and if they do not take the Levering Act oath, they are ineligible for employment by the state. If there is any logic or common sense in such reasoning, it is not apparent to me and I have grave doubt that it will appeal to any thinking person.

I have no doubt as to the good intentions of the various legislative bodies which adopted these loyalty oath proposals, and I do not consider it the function of the judicial branch of the government to pass upon the wisdom of such proposals. The sole and only question before the courts is whether the enactments contravene some provision of the fundamental law—the Constitution. This is true even though a very grave question of public policy may be involved. It is for the Legislature and not the courts to declare the public policy of the state, providing such declaration is not in conflict with the Constitution.

We are therefore met at the outset of this discussion with the problem of what was intended by the framers of the Constitution when they wrote into Article XX, section 3, the words: "And no other oath, declaration, or test shall be required as a qualification for any office or public trust."

The section as it now appears in the Constitution of 1879 is precisely the same, word for word, as it was in the Constitution of 1849. There it was Article XI, section 3. (Browne, The Debates in the Convention of California on the Formation of the State Constitution, Wash. 1850, App. X.) Though there was debate on changing the language in the 1878 Convention, *no change was made*.

It seems clear that what the delegates to the original convention in Monterey in 1849 had in mind is the mandate of Article VI, clause 3, of the Federal Constitution and the experience leading up to the adoption of that clause. The debate in the 1849 Convention was singularly short. The committee which brought in the clause proposed the following (Browne, Debates, p. 255): "Members of the Legislature, and all officers, before they enter upon the duties of their officers, shall take the following oath or affirmation: I (A B) do solemnly swear (or affirm), that I will faithfully and impartially discharge and perform all the duties incumbent on me as . . . . . , according to

the best of my abilities and understanding, agreeably to the Constitution and Laws of the United States, and of this State; and I do further solemnly swear (or affirm) that since the adoption of the present Constitution, I, being a citizen of this State, have not fought a duel with deadly weapons within this State, nor out of it, with a citizen of this State, nor have I sent or accepted a challenge to fight a duel with deadly weapons, with a citizen of this State, nor have I acted as second in carrying a challenge, or aided, or advised, or assisted any person thus offending. So help me God."

Thus it will be seen that the committee proposed that all members of the Legislature and "all officers" take an oath in two parts, one as to the Constitution of the State and of the United States and the other as to not having participated in a duel. (The convention had just adopted Article XI, section 2, providing that anyone who after the adoption of the Constitution participated in a duel shall be deprived of, *inter alia*, holding any office of profit under the Constitution. Browne, Debates, p. 255.)

Mr. Halleck thereupon proposed a substitute in the language of the present Article XX, section 3, because "this substitute was the most simple he could find *on the subject* of any of the Constitutions." (Emphasis added.) (Browne, Debates, p. 256.) Mr. McDougal opposed the substitute on the ground that the section as proposed by the committee was necessary to carry out the object of the preceding section. A vote was taken on the substitute: it was adopted, and became a part of the proposed Constitution.

A comparison of the language of Article XI, section 3, with Article XX, section 3, shows a striking similarity to the language of Article VI, clause 3 of the Federal Constitution. A look at the Federal Constitutional debates should therefore prove helpful.

The idea that the legislative, executive and judicial officers, within the several states, ought to be bound by oath to support the Articles of the Union was proposed by Mr. Randolph (5 Elliott, Debates on the Federal Constitution 128), Messrs. Sherman, Gerry and Luther Martin felt the requirement intruded improperly on the states, but Mr.

Randolph's idea prevailed (5 Elliott 183, 351, 352). During the debate Mr. Wilson said "he was never fond of oaths, considering them as left handed security only. A good government did not need them, and a bad one could not or ought not to be supported" (5 Elliott 352).

The idea that "no religious test or qualification shall ever be annexed to any oath of office under the authority of the United States" was first proposed to the convention by Mr. Pinckney (5 Elliott, 446, 498), Mr. Sherman thought it unnecessary, "the prevailing liberality, being a sufficient security against such tests" (5 Elliott, 498). But the convention was cautious and adopted Mr. Pinckney's views (5 Elliott, 598), just as the whole country was cautious in insisting on the first ten amendments, now known as "The Bill of Rights."

The two ideas were combined and emerged as Article VI, clause 3 (5 Elliott, 564). Thus, it appears, if anything, that the California delegates, though taking a leaf from the Federal Constitution, went further and proscribed not only religious test oaths, as had the Federal delegates, but *any* test oath.

Nor did the debates in the 1878 convention change the picture. Four amendments to the 1849 language were suggested. All of them were defeated. (III Debates and Proceedings of the Constitutional Convention of the State of California [1878], pp. 1390-1391.) The first dealt with a requirement of bonds for sheriffs and marshals. The second deleted the word "executive," replaced it with "ministerial" and added oath requirements as to dueling, bribery, and employment of Asiatics. The third was an amendment to the second and deleted the words "members of the legislature," "judicial" and "ministerial," and added the words "state, county, township, district and municipal, executive, legislation, judicial and ministerial." The fourth struck out the word "test."

Each of these suggestions was defeated, one by one. If anything can be gleaned from this legislative history, it is that the delegates of 1878 determined to leave the provision as it had always been—in simple language meaning what it said: That only *one* oath could be required for those

in the public employ and *one* only. The abhorrence for test oaths for the servants of the public which prevailed in Monterey in 1848 and in Philadelphia in 1787 prevailed in Sacramento in 1878. It would prevail today were it not for the hysteria and name calling which has tended to obscure the traditional concept of the framers of both Constitutions.

It should be noted that the Levering Act oath is strikingly similar in its language and tone to the third and fourth amendments suggested at the Constitutional Convention of 1878. Indeed the first paragraph of the Levering Act is almost identical, word for word, with the first paragraph of the defeated 1878 amendments. And the second paragraph resounds as though in echo to the sentiments which moved the gentlemen in 1878 to propose an oath that one had not employed Asiatics.

But historical coincidence aside, the Levering Act oath and the constitutional oath are as different as day from night both in content and intent. In the first place, the constitutional oath is not a perjury oath. It relates to a state of mind, a promise in good faith to perform one's duties to the best of one's abilities. That an oath of office as relates to the future performance of duties does not relate to perjury was recognized by the Legislature even before the 1879 Constitution was enacted. (See Penal Code, § 120.) Furthermore, it is clear that the constitutional oath is a promissory declaration intended to solemnize an occasion and to impress upon the mind of the employee the trust upon which he is about to enter. It is not intended to inhibit one's thinking nor one's associations.

The majority holds that "We are satisfied that there is nothing in the Levering oath which goes beyond the object or meaning of section 3 of Article XX and that it is not the type of 'other oath, declaration or test' which was intended to be prohibited by that section." With this statement, I most emphatically disagree. The constitutional oath relates to the future: "I do solemnly swear (or affirm, as the case may be) that I *will* support the Constitution of the United States and the Constitution of the State of California, and that I *will* faithfully discharge the duties of . . ." There can be no other meaning than *that from the time of taking*

employment and the oath the affiant will support the constitutions. The Levering oath, on the other hand, calls for an oath regarding past activities: "that within the five years immediately preceding the taking of this oath (or affirmation) I have not been a member of any party or organization, political or otherwise, that advocated . . ." So far as the balance of the Levering Act is concerned, it might possibly be inferred from the constitutional oath that in swearing to support the two constitutions, the affiant impliedly swears to defend them "against all enemies, foreign and domestic" and that he would not become a member of any organization advocating the overthrow of the two governments by force and violence since the two matters just set forth would be, in reality, one and the same thing. But the fact remains that the words so stating are *not* in the constitutional oath except by implication. No such implication may be read into the constitutional oath with respect to that portion of the Levering Act relating to *past* affiliations. The above quoted statement from the majority opinion is deceptive in its simplicity in that it seeks to uphold the Levering Act, since that is the popular thing to do, but must in some manner avoid the clear, positive and unequivocal mandate of the constitution that "no other oath, declaration or test shall be required as a qualification for any office or public trust." The only way to avoid that provision is to say that there is no substantial difference between the two oaths. And to say that there is no substantial difference between the two is the height of absurdity. As was said in Sheehy v. Shinn, 103 Cal. 325, the Constitution will not be so construed as to permit an evasion of it; and to give effect to that instrument it has been declared to be as much the duty of the court to see *that it is not evaded as that it is not directly violated.* Inasmuch as constitutional provisions are, and have always been, unless expressly provided to the contrary, to be construed as prospective in operation, what can the result reached here be considered but an evasion of the provision declaring that no other oath, declaration or test *shall* be required?

If, as stated by the majority, there is no substantial difference between the two oaths, it would appear that the

Levering Act adds nothing to the constitutional oath and is, therefore, a nullity. All these petitioners have taken the constitutional oath and, if the two are the same, there appears to be no sound reason why they should lose their positions and means of earning a livelihood because they have refused to do a useless act. The law does not require useless acts (or so we have always been told), but if we follow the reasoning of the majority to its illogical conclusion, the law does require, on pain of dismissal from employment, the doing of such an act.

An act of government undertaken without constitutional authority and in excess of constitutional limitations is a nullity in law and may properly be disobeyed or resisted. "The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

"If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void." (Marbury v. Madison, 1 Cranch 137, 177.)

It is admitted by the majority that the two early cases of Cohen v. Wright, 22 Cal. 293 and Bradley v. Clark, 133 Cal. 196, held that the question involved in litigation of this sort was whether the Legislature had, in prescribing an oath, gone "beyond the intent, object and meaning of the Constitution" and whether the Legislature had prescribed an oath or test substantially different from that prescribed by the Constitution. As I have heretofore pointed out, the Levering Act provision relating to past affiliations *at least* goes far beyond the intent, object and meaning of the Constitution. It cannot then be said, with a clear conscience, that the two oaths are substantially

similar inasmuch as the Constitution in this respect speaks only of the present and the future. It cannot be denied that the two Constitutions are the supreme law of the state and of the United States and, as said by John Marshall, the greatest Chief Justice this country has ever known: "Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

"This doctrine would subvert the very foundation of all written constitutions. If would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. . . . [Such doctrine cannot be tolerated under the Constitution.] It is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

"Why otherwise does it [the Constitution] direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support:" (Marbury v. Madison, 1 Cranch 137, 178-180.)

The above quoted language of Chief Justice Marshall applies with equal force to the evasion practiced by this court in subverting the clear mandate of this provision of the Constitution to the additional requirements imposed by the Levering Act.

The principle here involved is of tremendous importance to those who believe in preserving the constitutional guarantees of fundamental civil liberties. These constitutional guarantees were written in the light of bitter experiences arising out of the exercise of arbitrary power or usurpation of power by the legislative or executive branch of the government. Constitutions were written to protect the individual against the exercise of such arbitrary power. The lessons of history reveal that at various times under the stress of inflamed public opinion both the Legislature and the Executive have attempted to circumvent constitu-

tional restrictions by adopting measures which seemed expedient in view of the exigencies of the situation at hand. In my opinion the Levering Act is such a measure. I think it is apparent from the language of the act that its proponents believed that the Legislature had the power to prescribe a different oath for all employees of the state except the constitutional officers, and that it was under this mistaken belief that the act was adopted. Now that this court has held that the constitutional prohibition against any other oath, declaration or test applies to every state and local officer and employee, the Levering Act which was designed to apply to all employees of the state except constitutional officers, should fall.

To my mind it is too plain to permit of argument that it was the intention of the framers of the Constitution that "no other oath, declaration or test" should ever be required of any public officer or employee of the state or any of its political subdivisions than that specifically provided for in Article XX, section 3 of the Constitution. The action taken at the constitutional conventions clearly demonstrates the correctness of this position. The defeat of proposed amendments which sought to enlarge the scope of the oath, the failure to confer upon the Legislature power to do anything other than *exempt* such inferior officers as it saw fit from taking the prescribed oath and the specific prohibition against requiring any "other oath, declaration or test . . . as a qualification for any office or public trust," makes it crystal clear that the framers of the Constitution intended to prevent just what the Levering Act is designed to accomplish. In other words they sought to limit and define the power of the Legislature in what history had revealed to be a most controversial field. Such being the obvious and unmistakable intention of the framers of the Constitution, the language of Chief Justice Marshall in Marbury v. Madison, supra, is particularly pertinent; " . . . [T]he powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time be passed by those intended

to be restrained? *It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act.* Between these two alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative act, and, like other acts, is alterable when the legislature shall please to alter it. . . . If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? *It is emphatically the privilege and duty of the judicial department to say what the law is.* . . . So, if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules shall govern the case. This is of the very essence of judicial duty."

But the majority of this court by its decisions in these cases is forsaking its sworn duty to support the Constitution of the State of California, and has abdicated its power, for the sake of expediency, to uphold an act which invades the constitutional guarantees of civil liberties of those affected by its mandates.

There is no question of loyalty involved in any of these cases. So far as appears from the records before us every employee here involved was fully investigated and there is no suggestion of any conduct even bordering on subversive activity on the part of any of them. They have merely sought to stand on their constitutional right to take the one and only oath which the Constitution prescribed. On this stand I unqualifiedly join them.

I would, therefore, grant the writ prayed for and restore petitioner to his position.

CARTER, J.

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SUPREME COURT OF THE UNITED STATES

No. 287.—October Term, 1952.

Al Polizzi, Petitioner, v. Cowles Magazines, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 1, 1953.]

Mr. Justice Minton delivered the opinion of the Court.

Respondent, an Iowa corporation which publishes *Look* magazine, maintains no offices in Florida, but sells its magazines to two independent wholesale companies which distribute them to retailers in Florida. Respondent does employ two "circulation road men" whose job is to check retail outlets in a multi-state area which includes Florida. These two road men cover separate and mutually exclusive districts, and neither exercises any supervision over the other. Petitioner, a resident of Florida, brought suit against Respondent in the Circuit Court of Dade County, Florida, for allegedly libelous matter printed in *Look* magazine. Respondent moved to dismiss or in lieu thereof to quash the return of service, made on an agent of one of the distributing wholesalers. Before the state court acted on this motion, Respondent removed the action to the United States District Court for the Southern District of Florida. See 28 U. S. C. (Supp. V) §§ 1332, 1441, 1446, 1447 (b). That court issued an additional summons which was served on Briardy, one of Respondent's road men, "as a managing agent of [Respondent] transacting business for it in the State of Florida . . . ." See 28 U. S. C. (Supp. V) § 1448; Fed. Rules Civ. Proc., 4 (d)(3), (7); Fla. Stat. Ann., 1943, § 47.17 (5). On Petitioner's motion, the original state court service was quashed. Respondent then moved the court "to dismiss

this action or in lieu thereof to quash the return of purported or attempted service of the additional summons . . . ." The District Court, without passing upon the motion to quash the return of service, dismissed the action on the ground that it did "not have jurisdiction under Section 1391, sub-section C, New Title 28, United States Code" because Respondent "was not, at the time of the service of the summons, doing business in [the Southern District of Florida]." The Court of Appeals for the Fifth Circuit affirmed on the same ground, 197 F. 2d 74, and we granted certiorari. 344 U. S. 853.

The only question in this case on the record before us is whether the District Court correctly dismissed the action for want of jurisdiction.

Both courts below held that the District Court lacked jurisdiction, but they reached that conclusion by deciding that Respondent was not "doing business" in Florida within the meaning of 28 U. S. C. (Supp. V) § 1391 (c). Section 1391 is a general venue statute. In a case where it applies, if its requirements are not satisfied, the District Court is not deprived of jurisdiction, although dismissal of the case might be justified if a timely objection to the venue were interposed. 28 U. S. C. (Supp. V) § 1406. But even on the question of venue, § 1391 has no application to this case because this is a removed action. The venue of removed actions is governed by 28 U. S. C. (Supp. V) § 1441 (a), and under that section venue was properly laid in the Southern District of Florida. *Lee* v. *Chesapeake & O. R. Co.*, 260 U. S. 653; *General Investment Co.* v. *Lake Shore & M. S. R. Co.*, 260 U. S. 261, 270–279; *Moss* v. *Atlantic Coast Line R. Co.*, 157 F. 2d 1005.[1]

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[1] See also 1 Barron and Holtzoff, Federal Practice and Procedure, § 101; Charles W. Bunn, Jurisdiction and Practice of the Courts of the United States (5th ed., Charles Bunn, 1949), 146–148; Moore, Commentary on the United States Judicial Code, 199.

The pertinent provisions of the two statutes are set forth in the margin.[2] Section 1391 (a) limits the district in which an action may be "brought." Section 1391 (c) similarly limits the district in which a corporation may be "sued." This action was not "brought" in the District Court, nor was Respondent "sued" there; the action was *brought* in a state court and *removed* to the District Court. Section 1441 (a) expressly provides that the proper venue of a removed action is "the district court of the United States for the district and division embracing the place where such action is pending." The Southern District of Florida is the district embracing Dade County, the place where this action was pending. 28 U. S. C. (Supp. V) § 89.

Therefore, the question whether Respondent was "doing business" in Florida within the meaning of § 1391 (c) is irrelevant, and the discussion of that question is beside the point. The District Court based its holding that it lacked jurisdiction on a statute which has no application to the case, and the Court of Appeals affirmed on the same reasoning.

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[2] "§ 1391. Venue generally.

"(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be *brought* only in the judicial district where all plaintiffs or all defendants reside.

. . . . .

"(c) A corporation may be *sued* in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." (Emphasis supplied.)

"§ 1441. Actions removable generally.

"(a) Except as otherwise expressly provided by Act of Congress, any civil action *brought* in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, *to the district court of the United States for the district and division embracing the place where such action is pending.*" (Emphasis supplied.)

We express no opinion whether Respondent was "doing business" in Florida within the meaning of the due process requirements set out in *International Shoe Co.* v. *Washington*, 326 U. S. 310, because Respondent has not contended that the *International Shoe* test is not met.[3] Nor do we decide whether the District Court acquired jurisdiction of the person of Respondent by proper service, because the lower courts did not pass on the question of service. Therefore, the judgment of the Court of Appeals is reversed, and the cause is remanded to the District Court to take jurisdiction of the action and determine whether the District Court acquired jurisdiction of Respondent by proper service.

Reversed.

MR. JUSTICE FRANKFURTER, not having heard the argument, took no part in the consideration and disposition of this case.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

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[3] "In the case now before the Court no question of due process is involved." Brief for Respondent in Opposition to Writ of Certiorari, p. 9. "All this has nothing to do with due process . . . ." Brief for Respondent, p. 17.

SUPREME COURT OF THE UNITED STATES

No. 287.—October Term, 1952.

Al Polizzi, Petitioner, *v.* Cowles Magazines, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 1, 1953.]

Mr. Justice Black, with whom Mr. Justice Jackson joins, concurring in part and dissenting in part.

Polizzi lives in Coral Gables, Florida. He has been in the construction business there for some years. Cowles Magazines, Inc., an Iowa corporation, publishes *Look*, a magazine circulating nationally. May 23, 1950, *Look* carried an article branding Polizzi as one of the ringleaders of a national gang of murderous, blackmailing prostitute-pandering criminals. Nearly 50,000 copies covered Florida. Many were displayed and distributed in Polizzi's home town. He at once wrote the publisher that the charges against him were false, demanding both retraction and apology. It did nothing. Polizzi then brought this libel suit in the state circuit court of his home county. Appearing "specially" in the local United States District Court, the Cowles corporation obtained an order for removal of the case from state to federal court. It asked the District Court to dismiss the case without giving Polizzi a chance to have it tried on the merits. The reasons urged were that Cowles was an Iowa corporation, was not and had not been "doing business" in Florida and consequently could not be sued in the Florida court unless it consented to be sued there. The effect of this contention was that while Polizzi could bring his libel suit in a federal district court in the corporation's home state of Iowa, no such suit could be maintained

in a federal court in the state where Polizzi lived and where the criminal charges were likely to do him the most harm. Agreeing with Cowles, the District Court dismissed Polizzi's suit without giving him a chance to try the case on its merits. The Court of Appeals affirmed. For many reasons I think the dismissal was wrong and therefore concur in this Court's reversal of that dismissal. From this point on, however, I part company with the Court.

This Court reverses solely because both the District Court and the Court of Appeals in dismissing referred to and relied on the "doing business" provisions of 28 U. S. C. § 1391 (c), a venue statute not applicable to removal cases like this but to suits originally filed against corporations in United States District Courts. For this reason, not suggested by Cowles or Polizzi, the Court refuses to pass on the "doing business" contention which Cowles did make and which both courts below decided.[1]

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[1] The record makes clear that the "doing business" question was the ground on which Cowles made the motion to dismiss, the ground on which the District Court dismissed the lawsuit, the ground on which the Court of Appeals affirmed, and a ground on which Cowles asked us to affirm the dismissal. The corporation's motion to dismiss asserted that "The defendant is a corporation organized under the laws of Iowa and was not doing or carrying on business in Florida at the time of such purported or attempted service and is not doing and has never done business within the State of Florida so as to be present in Florida . . . ." Evidence of a number of witnesses was heard on this "doing business" question. The District Court dismissed by finding "as a matter of fact that defendant was not, at the time of the service of the summons, doing business in this district. . . ." and then related the dismissal to 28 U. S. C. § 1391 (c). The Court of Appeals affirmed on the same ground, saying that the company could not "be said to be doing business in the state so as to be subject to suit there." It reached this conclusion because it thought the company's activities were not within "the meaning of doing business" as "discussed in the authorities" to which it referred, namely, *International Shoe Company* v. *Washington*, 326 U. S. 310,

This means the case goes back for reconsideration of the same old "doing business" question that has been hanging fire for three years. It took three years for Polizzi to get here and have the Court by-pass the "doing business" question this time. If he is lucky enough to get that question back here and decided for him in three more years, he may then look forward to the possibility of having a jury try his case sometime along about 1957.

I think this Court should here and now reject Cowles' dilatory contentions. There may have been some reason for snarling up lawsuits against foreign corporations a hundred years ago because of newly expanding activities of migratory businesses. But there is no such excuse now. A large part of the business in each and every state is done today by corporations created under the laws of other states. To adjust the practical administration of law to this situation the Court in recent years has refused to be bound by old rigid concepts [2] about "doing business." Whether cases are to be tried in one locality or another is now to be tested by basic principles of fairness,[3] unless, as seems possible, this case represents a throwback to what I consider less enlightened practices.

Under any of the concepts, old or new, I think Cowles was doing business in Florida. It had a regular agent there, paid by the month, whose sole job was to carry

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and a number of other cases of this Court cited in footnote 2, 197 F. 2d 74, 76. And in this Court the corporation argued specifically that ". . . the conclusion is inevitable that the courts below in holding that respondent was not transacting business in the State of Florida fairly followed the principles laid down in the *International Shoe Co.* case."

[2] Cf. von Jhering, In the Heaven of Legal Concepts, translated in Cohen and Cohen, Readings in Jurisprudence and Legal Philosophy, 678–680.

[3] See on this point *International Shoe Co.* v. *Washington*, 326 U. S. 310; *Travelers Health Assn.* v. *Virginia*, 339 U. S. 643; *United States* v. *Scophony Corp. of America*, 333 U. S. 795.

on activities for Cowles in order to increase *Look's* circulation in that state. On this agent, who managed for the publishing corporation all the business it carried on in Florida, process was served. These facts, together with others which I need not labor, show the frivolous nature of the "doing business" question. They show also the lack of merit in the question the Court tells the district judge to pass on: Should the 1950 notice by service on the corporation's regular Florida representative be held sufficient to require it to defend, or should the District Court now after three years' litigation quash that service and require that new notice of the suit the corporation is here defending be served on some other company employee? I venture to suggest that if this question were raised anywhere except in a court, it would be dismissed as ludicrous.

But aside from what has been said, there is a new statute which gives an anachronistic flavor, a sort of irrelevance to all of Cowles' dilatory motions and arguments. I refer to 28 U. S. C. § 1404 (a), which has codified the doctrine of *forum non conveniens*. That statute gives district judges broad powers to transfer civil actions from one district to another "in the interest of justice." [*] And the heart of Cowles' contention is that it would be unfair, inconvenient and unjust to subject it to a suit in the District Court of Florida. But the Iowa corporation has not denied at all that it could be subjected to this

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[*] 28 U. S. C. § 1404 (a) provides:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

A companion statute, 28 U. S. C. § 1406 (a), provides:

"The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

libel suit in the federal district court in Iowa or in some other district where the corporation is "doing business." Therefore, the question Cowles has been raising from the beginning is: In what federal district court does the fair administration of justice require that this lawsuit be tried? This poses precisely the problem which the rule of *forum non conveniens* is designed to meet and solve. In light of that rule I think we should reject Cowles' old dilatory motions and direct the District Court in Florida to try this case at once, unless Cowles can show that court that it would be in the interest of justice to try the case in another district. But the Court refuses to discard old outdated concepts for the new rule of convenience and fairness. Instead Polizzi is sent back to the District Court not to try his case on the merits but to listen a few more years to a debate over whether Cowles has had adequate notice of this suit and whether the corporation is "doing business" in Florida. In the meantime, Polizzi stands convicted in the eyes of his community on the basis of an unproved story. At least since Magna Charta some people have thought that to delay justice may be to deny justice. I would order that Polizzi be given the trial he seeks.[5]

MR. JUSTICE BURTON, concurring in part and dissenting in part.

I agree that the District Court and the Court of Appeals erroneously referred to the wrong venue statute in deciding the question of "doing business." Like MR. JUSTICE BLACK I think it unfortunate that this case must be prolonged by a remand to consider again the same "doing business" question under another statute. Un-

[5] 28 U. S. C. § 2106 provides that this Court in reversing judgments may direct the District Court to enter such orders as are "just under the circumstances."

like MR. JUSTICE BLACK, however, I find nothing in the majority opinion to suggest that the enlightened rationale of our more recent cases such as *International Shoe Co.* v. *Washington*, 326 U. S. 310, has been abandoned or impaired. Nor do I find any hint in the majority opinion that anything in the Constitution or other federal law prohibits the trial of this case in a United States District Court in Florida. My objection is that the majority have not ruled on this question at all.